

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
vs.)
) CRIMINAL NO.:
WILLIAM PATRICK MITCHELL and) 1:21-cr-00090-SAG
WAYNE I. KACHER, JR.,)
)
Defendant.)
_____)

Baltimore, Maryland
July 14, 2023

TRANSCRIPT OF PROCEEDINGS
MOTIONS HEARING
BEFORE THE HONORABLE STEPHANIE A. GALLAGHER
Courtroom 7C

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Also Present: Defendant Mitchell via telephone

1 (Computer-aided transcription of stenotype notes)

2 P R O C E E D I N G S

3 (11:31 a.m.)

4 THE COURT: Good morning. Please be seated everyone.
5 Mr. Phelps, would you like to call the case.

6 MR. PHELPS: Yes, Your Honor, good morning. Calling
7 Case No. 1:21-cr-90, United States of America versus William
8 Patrick Mitchell and Wayne I. Kacher, Jr. We're here today for
9 a motions hearing. Assistant U.S. Attorneys Matt Phelps and
10 Paul Riley on behalf of the United States.

11 THE COURT: Good morning to you.

12 MS. ABELSON: Good morning, Your Honor. Laura
13 Abelson and Cara Halverson on behalf of Mr. Mitchell who is
14 appearing by telephone today.

15 THE COURT: Good morning to all of you.

16 MR. PERCICAK: Good morning, Your Honor. William
17 Pericak on behalf of Mr. Wayne Kacher. Mr. Kacher has waived
18 his appearance, and I filed it with the court.

19 THE COURT: Yes, I received both waivers of personal
20 appearance so we don't have either of the defendants present,
21 but they have both permitted this hearing to proceed in their
22 absence -- or at least Mr. Mitchell is able to hear us but not
23 participate.

24 Okay. So we do have three different motions that
25 have been filed in this case. So we have a number of issues to

1 discuss. I want to start with sort of the stand-alone issue of
2 the return of the seized items being sought by Mr. Kacher,
3 which I think is sort of a little bit on its own, and start by
4 asking the Government to again explain to me what the issue is
5 with returning the seized items at this point.

6 MR. PHELPS: Your Honor, we certainly can. I think
7 there's a concern if this case does proceed to trial and for
8 whatever reason there's a need to have access to this material.
9 Again, I think we'd love to be convinced that the images that
10 we obtained of those devices are kind of perfect and adequate
11 and have no problems and no issues whatsoever. I tend to think
12 that e-discovery does tend to have problems associated with it,
13 and I think there's just a concern about relinquishing control
14 of evidence that could be used at trial.

15 THE COURT: Is there any suggestion -- I assume that
16 the people who made the duplicate copy have checked it over to
17 try their best to ensure that it's adequate?

18 MR. PHELPS: That is accurate, yes, Your Honor.

19 THE COURT: I don't need to hear from you. I do
20 think it's appropriate for it to be returned at this point.
21 The Government has had an opportunity to make a duplicate. To
22 the extent you'd like to briefly do another check over to make
23 sure that as far as you can tell it's functioning properly,
24 that's fine, but I do think that the defendant is entitled to
25 its return. And so I will grant ECF 58 to return the items.

1 Okay. As I said, that was sort of the stand-alone
2 issue. Then we have a number of issues that at least to some
3 extent, I'll sort of relate together. It seems to me that
4 maybe a good place to start would be the confrontation clause
5 issue, Mr. Kacher's motion to strike paragraph 35 of Count 1
6 having to do with Mr. Mitchell's statement. Unless the parties
7 have a better idea of how to proceed. That seems to be one of
8 many issues that we need to talk about this morning.

9 Mr. Pericak, I'll allow you to go first.

10 MR. PERCICAK: Thank you, Your Honor. Very briefly,
11 and it's covered in our papers, but Mr. Mitchell's statement is
12 hearsay. It's an out-of-court statement, and we cited a number
13 of cases in our reply. We cited one major case in our moving
14 paper, *Lyle*, and other cases in our reply. It's an implied
15 assertion and it's offered for the truth of the implied
16 assertion and that's why it's hearsay, and it's not admissible
17 against Mr. Kacher.

18 I can go through with Your Honor the cases and all
19 the reasoning and all that, but I think it's clear in the
20 papers. The reason why it should be stricken is a *Bruton* issue
21 because it clearly implicates directly Mr. Kacher. The
22 statement -- when you read the FBI 302, they're showing him
23 checks that Mr. Kacher endorsed to Mr. Mitchell, and Mitchell
24 says that "Those checks are not a kickback, I don't take
25 kickbacks." It directly -- and it's offered not for the truth

1 of I don't take kickbacks. Obviously, it's offered that it's a
2 false exculpatory statement and therefore directly implicates
3 Mr. Kacher.

4 So I think it's hearsay, clearly hearsay,
5 and although there are ways that the Court could say, "Well,
6 jury, it's only admissible against Mr. Mitchell," I think under
7 *Bruton*, it's very clear it directly implicates Kacher, and
8 therefore it's a *Bruton* issue, and the Court does not have the
9 discretion to allow it in with a limiting instruction.

10 I would add if the Court disagrees with me on that, I
11 would ask the Court in your discretion to not let it in because
12 it is a strong piece of evidence and recognizing that a
13 limiting instruction -- we want to live in the life of, well,
14 we gave a limiting instruction to the jury and we assume they
15 followed it. This would be a very tough one for them to
16 follow. As would -- as we're going to get to the other
17 argument, it's my same position. Very tough to expect the jury
18 to follow limiting instructions on issues that go right to the
19 heart of what the issue is. Thank you.

20 THE COURT: Let me ask you this because you said it
21 pretty clearly implicates Kacher. The statement itself taken
22 on its face doesn't implicate anybody because it is
23 exculpatory. But the Government -- the reason for which the
24 Government would be introducing the statement as a false
25 exculpatory, that's what would implicate your client, right?

1 MR. PERCICAK: Correct.

2 THE COURT: Do I have that analysis right?

3 MR. PERCICAK: Of course, *Lyle* says it's the reason
4 that they're offering it that we look at to decide whether or
5 not it's hearsay. But that's correct.

6 THE COURT: Do attorneys for Mr. Mitchell have
7 anything they wanted to say on this before I hear from the
8 Government?

9 MS. ABELSON: No, Your Honor.

10 MR. PHELPS: So, Your Honor, I don't know if this is
11 semantics or what, but the nature of the motion, the motion to
12 strike, I interpreted it as a motion to strike from the
13 indictment, but it sounds like this is a motion in limine to
14 exclude evidence. So I'm not really sure that the motion to
15 strike an allegation from the indictment is worthy of much
16 discussion. I don't know if Your Honor typically lets the
17 indictment go back with the jury.

18 THE COURT: No, I typically don't. So to the extent
19 it's a motion to strike something from the indictment, I'm not
20 sure it has much import at this stage. Do you want to clarify
21 that, Mr. Pericak, in terms of what you're requesting?

22 MR. PERCICAK: I'm going to request that the
23 indictment go back to the jury because this is a complex case
24 with a lot of evidence, a lot of allegations, and I am
25 constructing my case point by point in rebuttal, and I think

1 that -- of course, Your Honor has the discretion whether or
2 not. It's not a drug case, it's not the same, you know, "on or
3 about December 6 he did possess with intent" -- it's a very
4 complex civil -- very complex fraud case. And I think it's
5 important for the jury, when they sit -- I've done these cases,
6 I'm sure Your Honor has done these cases, if they sit for a
7 week and hear all this stuff, if you gave them a test, I don't
8 even know if they remember ten percent of what they heard. I
9 think it's important that they have some guidelines, and I will
10 request that it go back to the jury at the end. Obviously then
11 I want that part of it stricken.

12 MR. PHELPS: So, Your Honor, the statement is not
13 hearsay. It's being offered for its falsity, not for its
14 truth. It's also not hearsay because it is a statement in
15 furtherance of the co-conspiracy. One of the objects of the
16 conspiracy is to conceal the conspiracy and the conspiracy
17 covers 2018; the statement was made in 2018. Just as
18 defendants and targets try to hide their conduct by concealing
19 their conduct, there's really no difference between that and
20 what happened here. So for those reasons, I don't think that
21 it's hearsay.

22 I also don't think that it's a *Bruton* issue either,
23 Your Honor, because in order to trigger *Bruton*, there needs to
24 be a confession that implicates the co-defendant. It's not a
25 confession, it's a denial. I think there's kind of significant

1 implications if we start saying that a denial, because it's
2 implausible, turns into a *Bruton* issue because then every time
3 any defendant denies any conduct in a multidefendant case, you
4 have a *Bruton* issue. I don't read *Bruton* or any of the cases
5 to really extend it that far.

6 Then additionally, Your Honor, *Bruton* is only an
7 issue if Mr. Mitchell does not testify, and we don't even have
8 a trial date yet. We, frankly, don't even know if we have a
9 confrontation clause issue yet either.

10 THE COURT: Okay.

11 MR. PHELPS: Thank you.

12 MS. ABELSON: Your Honor, may I be heard?

13 THE COURT: Yes.

14 MS. ABELSON: We're going to take no position on this
15 motion, but that was under the assumption that the indictment
16 would not be going back to the jury. If the indictment is
17 going back to the jury, then we would object to the inclusion
18 of the statement that it was a false statement.

19 THE COURT: Because -- I don't think I have the
20 indictment --

21 MS. ABELSON: The indictment itself says it was a
22 false statement which is not a factual allegation. It's a
23 legal characterization, so we would actually join in
24 Mr. Kacher's motion to strike that from the indictment if the
25 indictment is going back to the jury.

1 THE COURT: All right. I am not going to decide
2 right now whether the indictment is going back to the jury.
3 Again, my standard policy is that it does not. I tend to abide
4 by that in most circumstances, but when we get closer to the
5 trial, I'll hear you, Mr. Pericak, if you want to try again to
6 change my mind as to that ruling. So I'm not making any
7 decisions presently about the indictment going back to the
8 jury.

9 If I do decide that it is going to go back, obviously
10 I will hear from the parties about whether there are any
11 particular redactions that would need to be made for that to
12 happen, so I'm not going to rule on that aspect today.

13 MR. PERCICAK: May I respond on the co-conspirator
14 statement?

15 THE COURT: Yes.

16 MR. PERCICAK: It's not a co-conspirator statement.
17 All you need to do is look at *Grunewald* to see. The last overt
18 act in the indictment is alleged in 2017. The FBI does a
19 search 18 months later, and it's during the search that
20 Mr. Mitchell makes the statement that "it's not a kickback, it
21 might be a loan." Mr. Kacher's place being searched, he says,
22 "I 100 percent felt pressure, these are not loans." They're
23 diametrically opposed. But it's 18 months apart. In *Grunewald*
24 the Court held that where the defendants got the accountant to
25 lie in the grand jury, that was not a co-conspirator statement;

1 that was a statement to conceal a past crime. And I submit
2 that's what's going on here. Between the 18-month lapse
3 between the last overt act and this statement, the fact that
4 it's made during this search, I think that to say -- to make a
5 factual finding that it was made during and in furtherance of
6 the conspiracy is clearly erroneous.

7 THE COURT: Anything else on that?

8 MR. PHELPS: Your Honor, we define the conspiracy in
9 the indictment as going from July of 2014 through 2018. We're
10 not required to essentially populate the indictment with acts
11 one per month or two per month to fill the gaps in this period.
12 This statement was made to conceal the conspiracy. It was made
13 during the time period in the indictment, the time period
14 alleged in the indictment.

15 MR. PERCICAK: I'll just add that *Grunewald* is the
16 same facts. That was alleged in the indictment as being part
17 of the conspiracy and the Court still said no go.

18 THE COURT: All right. I'm not sure I need to reach
19 that because I am persuaded by the Government's argument that
20 this is not hearsay because it's not being introduced for the
21 truth of the matter asserted. It is introduced for essentially
22 its falsity, not for its truth.

23 As to the *Bruton* aspect of it, I am not persuaded
24 that it clearly implicates a defendant even to the extent that
25 Mr. Mitchell does not testify and, again, we don't know that

1 yet. So at this point I'm going to deny -- I'm not ruling on
2 the motion to strike it from the indictment because I'm not
3 sure that we need to worry about that. I'm not intending that
4 the indictment go back at this point, and if I change my mind
5 about that later, we can talk about redactions then. I am
6 going to deny what I will interpret as a motion in limine to
7 exclude that piece of evidence and deny that. So at present,
8 that would be admissible.

9 Okay. So we've dealt with that. We have the
10 severance issues which is where I think it makes sense to go
11 next because there's another motion to strike various
12 paragraphs, but that sort of hinges on whether or not the
13 motion to sever is granted. So I think we should maybe turn
14 now to the severance.

15 There are sort of two aspects to the severance
16 motion. One has to do with Mr. Kacher's motion to sever
17 certain counts that rely on acts from 2014 which arguably are
18 time barred as to Mr. Kacher. So why don't we start with that,
19 and then we'll turn to the second aspect of the severance which
20 is the motion to sever the theft and embezzlement counts from
21 the bribery counts that are pending.

22 MR. PERCICAK: Thank you, Your Honor. You said
23 arguably but I think it's clear, the statute ran and anything
24 that occurred prior to whatever the date was, January 2015, is
25 barred. I think the Government acknowledges that --

1 THE COURT: Right. I said arguably but that does
2 seem to be that it's uncontested, and I see the Government
3 nodding.

4 MR. PERCICAK: So here's the point. I'm going to
5 focus on the jury instructions because that's where I really
6 think we should be a little forward looking, how are they going
7 to figure this out.

8 The Court is somehow going to have to explain to the
9 jury that the Government has to prove an overt act in
10 furtherance of the conspiracy, and three of the six overt acts
11 in 2014 they allege are Kacher endorsed a check to Mitchell.
12 It happened. There's no doubt that it happened. The jury when
13 it's instructed, and properly so, will be told in some
14 substance that if you find that Kacher endorsed any one of
15 these three or all three of these in furtherance of the
16 conspiracy, then -- whatever, Mitchell is guilty or what have
17 you. By the way, jury, if you find that Kacher is not
18 guilty -- and it's like, well, how is a jury supposed to
19 process the fact that an act that Kacher did is going to result
20 in Mitchell being found guilty -- or can result in Mitchell
21 being found guilty but not Kacher being guilty?

22 THE COURT: Isn't it a little clearer than that
23 though? Won't the instruction instead say: In order to find
24 Mr. Kacher guilty, you have to find an overt act that occurred
25 after January, whatever it is, 2015?

1 MR. PERCICAK: Yes. How is a jury supposed to
2 process that? Because they go back and they talk. They say,
3 wait a minute, why can we do this with Mitchell in 2014; why
4 isn't Kacher just as guilty? You can instruct them, I'm not
5 contesting that you can figure out a way to instruct them very
6 clearly. I'm contesting human nature and your discretion and
7 the ability of the jury to really think, oh, this is a
8 technicality, Kacher is going to get off on a technicality here
9 and to then dissipate the Government's burden of proof.

10 I think that it's so clear that the jury cannot be
11 expected to follow an instruction that says Mitchell can be
12 found guilty based on Kacher endorsing a check to him in 2014
13 but Kacher can't be found guilty based on the same act.

14 Then to just say, well, we're just going to find
15 Kacher guilty anyway because he did it and stuff happened in
16 2016, I just think that it dilutes the Government's burden of
17 proof really to the extent that the Court in its discretion
18 ought to order a separate trial with respect to 2014 and
19 strike -- I'm not saying -- the evidence comes in. That's
20 where Mr. Phelps said, well -- no, the evidence absolutely
21 comes in. But then when the jury is instructed on overt acts,
22 that's where I think that they're going to have trouble
23 processing and following even the best of instructions.

24 THE COURT: Thank you. Mr. Phelps.

25 MR. PHELPS: So, Your Honor, here's where I think

1 perhaps the distinction between the severance striking motions
2 and the motions in limine to actually admit or exclude the
3 evidence is relevant because Mr. Pericak just made clear in his
4 briefing and now that this evidence is coming in. It's
5 admissible. So he seems to have a problem with admissible
6 evidence that could be used to prove both the conspiracy and
7 the substantive bribery charges actually being in the
8 indictment and/or being before the jury for purposes of
9 adjudicating this matter. I'm not seeing the prejudice there
10 where admissible evidence related to the conspiracy, related to
11 the substantive charges is simply excluded from the text of the
12 indictment or that Mr. Kacher is getting his own separate
13 trial.

14 There's nothing legally that precludes us from
15 including older overt acts. I think what Mr. Pericak's
16 point -- I think it kind of comes down to two things. One is
17 he wants to argue that that older conduct is different. That's
18 the real difference. The older conduct is checks being
19 endorsed over the same day that the checks are being handed
20 from Mitchell to Kacher and from Kacher to Mitchell. He wants
21 to argue that that's different. So there's some upside for him
22 in being able to cast that conduct as different and having all
23 of that in one case in one conspiracy, I think that's really
24 what he's trying to avoid.

25 The second thing, Your Honor, is can the jury

1 understand that two different defendants have two different
2 statute of limitations. I don't see why they can't. It can,
3 frankly, be put in the jury instructions, it can be in the
4 verdict form. Do you find that Mr. Kacher engaged in an overt
5 act after this date? Do you find that Mr. Mitchell engaged in
6 an overt act after this date? I don't think that's too
7 complex.

8 THE COURT: I assume, Ms. Abelson, you're not
9 weighing in on this particular issue?

10 MS. ABELSON: No, Your Honor.

11 THE COURT: Go ahead, Mr. Pericak.

12 MR. PERCICAK: I agree with almost everything
13 Mr. Phelps said. I do have that tactical reason for wanting it
14 out; there's no doubt about that. But as far as telling the
15 jury about the statute of limitations, I did cite a case --
16 it's an unpublished Eleventh Circuit case -- but the idea that
17 the jury is going to think "Ah, he's getting off on a
18 technicality," that's just not fair. That should not be part
19 of anything the jury should have to worry about or consider.

20 I want to say one other thing about two trials and
21 all the burden and stuff. Mr. Kacher -- the trial of
22 Mr. Kacher is wham, bam and over with. There's very little.
23 The trial of Mr. Mitchell where, even if you grant the motion
24 to sever the embezzlement counts, they're going to offer 600
25 embezzlements, it's 404(b), I just think the quickest -- by the

1 way, Mr. Kacher is going to be ready in October for trial. I
2 know the embezzlement makes it a hell of a lot -- pardon me --
3 much more complicated for the federal defenders, and they need
4 more time. But I think a quick, immediate trial of Mr. Kacher
5 in October solves all the problems and all the issues.

6 Your Honor may very well be right in your rulings,
7 but those are appeal issues and if it comes back, you're just
8 going to have another trial again. I think that the best
9 course, the prudent course I would recommend and urge is let's
10 try Kacher in October, and then we don't have to worry about
11 all this.

12 THE COURT: I'll tell you right now I don't have
13 trial dates available in October, so that portion is not going
14 to happen but --

15 MR. PERCICAK: November, December...

16 MR. PHELPS: Your Honor, one point because I think it
17 does touch on the other motions to sever and issues related to
18 judicial economy. If Mr. Kacher's severance is granted and
19 Mr. Mitchell's severance is granted, we're talking about three
20 trials, and I don't think that's in anybody's best interest.
21 So it overlaps the other severance motion but I just wanted to
22 make that point.

23 THE COURT: Yes, thank you.

24 MR. PERCICAK: I'm sorry, one other thing.

25 Mr. Kacher also made extensive statements to the FBI which I

1 don't know, I assume -- when I was a prosecutor, I would have
2 offered it; I assume it's going to be offered. And it
3 implicates Mr. Mitchell. So you have a *Bruton* problem with his
4 statement. So I think there's a lot -- we can deal with things
5 right now, okay, that's fine. But if we look forward and
6 anticipate what's going to happen, there's other problems down
7 the road and I don't think the problem, this three separate
8 trials, I don't think it's a big deal. I think the Kacher
9 trial is a quick one. I think that Mitchell -- if Mitchell
10 bribery needs to be severed from Mitchell embezzlement, those
11 are two separate trials that are all relatively quick.

12 THE COURT: Does anyone else see a *Bruton*, potential
13 *Bruton* issue going the other direction?

14 MR. PHELPS: Your Honor --

15 THE COURT: Obviously it wasn't raised in the
16 papers.

17 MR. PHELPS: It wasn't raised in the papers, Your
18 Honor. That was done through a proffer with Mr. Kacher, and
19 there can be issues that need to be sorted through when a
20 statement is offered kind of over the protections that were
21 otherwise put in the proffer agreement, and I'm not sure I'm
22 prepared to take a position on that today.

23 MR. PERCICAK: I'm sorry, I'm not talking about the
24 proffer statement. I'm talking about the date of the search
25 warrant; that statement where they interviewed him extensively

1 about the three checks and the endorsements and he explains
2 what happened and why. Anyway, I'm -- the reason I bring that
3 up, Your Honor, is because I do think that, again, even if it's
4 admitted, you're going to have another limiting instruction.
5 So you're limited -- you can't think about 2014, and now you
6 can't think about Mitchell implicating Kacher. You can't think
7 about Kacher implicating Mitchell. A lot of compartmentalizing
8 going on here and that's why my proposal I think is in the best
9 interest of everyone.

10 THE COURT: Okay.

11 MR. PHELPS: I just prefer a motion so that we have
12 an opportunity to fully brief that and flesh that out. That's
13 not something Mr. Mitchell's counsel has raised to this
14 point.

15 MS. ABELSON: Your Honor, our position was exactly
16 what Mr. Phelps said earlier. We did not believe that it was
17 ripe at this point because it was not clear to us what the
18 Government intended to introduce in a joint trial because of
19 the nature of Mr. Kacher's statements having been made during a
20 proffer session.

21 THE COURT: Okay. You're not aware of any statements
22 made outside of the context of a proffer session that might
23 create a *Bruton* problem or at least not now? It seemed to me
24 Mr. Pericak was not talking about proffer statements, he was
25 talking about something else.

1 MR. PERCICAK: Correct.

2 MS. ABELSON: I don't believe there are at this
3 point.

4 MR. PERCICAK: I'm sorry, he made a statement during
5 the search warrant to the FBI. That's what I'm talking about.
6 No proffer agreement, nothing. That's at the Government's
7 election, that's admissible against Mr. Kacher. Then there's
8 this second statement two months later where I brought him in
9 for a proffer. I think that one's out.

10 I'm referring, Your Honor, to the first statement
11 that he made to the FBI during the search warrant being
12 executed.

13 MR. PHELPS: Your Honor, generally that encounter
14 does sound familiar to me. I don't -- like I said, I think I'd
15 prefer an opportunity to brief that and again, Mr. Mitchell
16 doesn't seem to be concerned about that today.

17 THE COURT: It seems like maybe it hasn't been
18 highlighted for Mr. Mitchell either. Why don't we do this
19 then. I'm going to defer ruling on the motion to sever the two
20 defendants for trial on the conspiracy count, but I'm going to
21 direct the parties to go back and take a look at this issue
22 because this is obviously important for trial scheduling, and I
23 need to tee this up sooner rather than later.

24 I will say that on the issue about the 2014 versus
25 the other acts, I am of the view that a limiting instruction

1 will suffice. I am not persuaded that that particular issue
2 warrants severing these two defendants as to the conspiracy
3 trial. But I certainly want to hear more about this potential
4 *Bruton* issue. To the extent it is an issue, I want to assess
5 that before I make a final determination as to whether the
6 trials should be severed or not.

7 So I ask the parties to quickly take a look at that
8 and confer and let me know and then I can, depending on the
9 outcome of that, either order further briefing or make a
10 determination that the conspiracy trial will proceed forward
11 jointly.

12 Okay. Now we need to hear on the motion to sever the
13 theft and embezzlement counts from the conspiracy.
14 Ms. Abelson.

15 MS. ABELSON: Thank you, Your Honor. Your Honor,
16 Mr. Phelps just stated in a different context but that no one
17 would be served by having three separate trials. That is not
18 the case. Mr. Mitchell would be served by having separate
19 trials. We are here today to discuss that.

20 Our motion is relatively simple and I know that the
21 Government filed a consolidated response which conflated some
22 of the different issues, but our motion was first under Rule
23 8(a) which sets forth three possible grounds for joinder. Our
24 primary argument is that the counts -- that two sets of counts
25 against Mr. Mitchell, the bribery counts and the embezzlement

1 counts, have been misjoined under Rule 8(a).

2 There are three possible reasons for misjoinder under
3 Rule (a). They have to be part of the same act or transaction
4 which is not the case here; they have to be the same or similar
5 character which the Government has conceded they are not; or
6 they have to be part of a common scheme or plan which is where
7 the Government has focused their argument here.

8 A pretrial motion for relief from misjoinder under
9 Rule 8 is determined on the face of the indictment, that the
10 Court has to consider the indictment only. In this case I
11 think the indictment is really instructive on the ways in which
12 these two sets of counts are not part of the same common scheme
13 or plan.

14 If the Court looks at the indictment, pages 1 through
15 16 set forth the factual allegations that support the alleged
16 bribery conspiracy. Pages 22 through 24 set forth a separate
17 alleged scheme related to the embezzlement allegations.

18 Paragraphs 1 through 28, the Government incorporated
19 by reference into the second alleged scheme. But paragraphs 29
20 through 36, which set forth really the meat of the allegations
21 that are contested in this case related to the alleged bribery
22 scheme, it's all of the substantive proof the Government would
23 have to make related to the alleged bribery scheme are not
24 incorporated by reference into the second scheme that's set out
25 on pages 22 through 24. So by the Government's own drafting in

1 this indictment, they've illustrated why these are not part of
2 a common scheme or plan.

3 Paragraphs 1 through 28 which are incorporated by
4 reference are not contested. They set forth background
5 incorporation about Maryland Broadband Corporation [sic]. They
6 set forth information about Mr. Mitchell's position at Maryland
7 Broadband, about the existence of the federal contracts. None
8 of that is in dispute. All of that essentially can be
9 stipulated at either trial. It's really the only paragraphs
10 that are in dispute are the ones that are not incorporated from
11 one alleged scheme to the other. So it illustrates why they
12 are not the same.

13 The time frames are also different. The Government
14 argues that they are the same but they are not. In the
15 indictment, the facts alleged with respect to the bribery
16 scheme include acts from 2014 to 2017. The facts alleged in
17 the alleged embezzlement scheme are from 2016 through 2019.
18 Various cases that we cited in our pleadings and from around
19 the country make clear that joinders are only proper under this
20 theory of it being a common scheme or plan where the proof of
21 one set of claims constitutes substantial proof of another. In
22 this case, that is just not the case between these two sets of
23 claims.

24 The offenses share no elements except the existence
25 of the federal -- receipt of federal funds which is not in

1 dispute. And we also cited a number of other fraud cases that
2 illustrated ways in which courts have parsed this where there
3 are some overlapping background facts where someone is --
4 where, for example, there are two frauds that occur as are
5 alleged in this case, with someone who works for a single
6 company, a tax fraud and some separate fraud, but there's no
7 clear connection between the two sets of allegations. And
8 courts have severed those cases. The mere fact that
9 Mr. Mitchell was the CEO of Maryland Broadband during both sets
10 of alleged offenses is not enough to suggest they are part of a
11 common scheme or plan.

12 So really in this case the only way that the
13 Government can allege that there's a common scheme or plan, as
14 we set forth in our reply, is by using one set of allegations
15 as propensity evidence to prove the other set of allegations.
16 So it's really a boot-strapping issue here where they're trying
17 to show that Mr. Mitchell must have committed one set of
18 offenses because they allege that he has committed the other
19 set of offenses, and the defenses that we would put on --
20 although I do not believe the Court should look outside the
21 indictment at this stage -- would be different as to the two
22 separate accounts.

23 They involve different players. The embezzlement
24 counts are related basically entirely to Mr. Kacher -- I'm
25 sorry, the bribery counts are related entirely to

1 Mr. Mitchell's relationship with Mr. Kacher. The embezzlement
2 counts involve Mr. Mitchell's relationships with other
3 employees at Maryland Broadband Cooperative, MdBC, and
4 Mr. Mitchell's relationships with the board of directors at
5 MdBC and they don't involve Mr. Kacher at all. The only real
6 connection between this is Mr. Mitchell and the Maryland -- and
7 MdBC.

8 So for those reasons, we believe that severances of
9 the two sets of counts are proper.

10 THE COURT: All right. Mr. Phelps, do you wish to be
11 heard?

12 MR. PHELPS: Yes, Your Honor. I think my arguments
13 are going to be very duplicative of my response to Mr. Kacher's
14 forthcoming argument as well. First of all, I wanted to read
15 from the indictment sections from both the bribery section and
16 the embezzlement section. It says: The object of the
17 conspiracy and scheme of artifice to defraud was for Mitchell
18 to secretly use his official position at MdBC to enrich himself
19 by soliciting payments, gifts and other things, but it's an
20 object of the conspiracy for him to enrich himself.

21 If we go to the theft counts, the theft count says:
22 Mitchell was authorized to use an MdBC business credit card for
23 MdBC business. And in the next paragraph it says: Mitchell,
24 however, frequently used his MdBC credit card for personal
25 purchases. Mitchell also used his MdBC checks to pay for

1 personal purchases. So I think the indictment actually does
2 essentially allege a common scheme or plan in both sections
3 whereby Mitchell is using his position at MDBC to personally
4 enrich himself.

5 As a factual matter, Your Honor, I think we've shown
6 in the evidence -- I think we called it a flurry of activity by
7 Mr. Mitchell in which he personally enriches himself. In some
8 instances, he takes money directly from the company. In other
9 instances, it passes to Mr. Kacher before it's kicked back to
10 Mr. Mitchell. But I think there's -- in terms of the
11 commonality of the conduct, I think it's -- one is a direct
12 payment to him from MDBC, and one is an indirect payment to him
13 from MDBC.

14 I think the evidence of both is admissible under
15 404(b) against the other for essentially those exact reasons,
16 and so I don't think it makes sense to have separate trials
17 when the evidence would be admissible in both cases.

18 There's the text of 8(a) and there's the text of
19 8(b). We'll talk about 8(b), Your Honor, but both -- if you
20 look at the cases that talk about both, it essentially comes
21 down to two considerations, prejudice by the joinder and
22 judicial efficiency. I don't think that there's any reason to
23 sever these trials. It would involve common witnesses. The
24 former CFO is going to have to testify at both. A forensic
25 accountant for the FBI would have to testify at both. A

1 representative of Maryland Broadband would likely have to
2 testify at both. From a judicial economy standpoint, that's
3 not a good use of the court's resources.

4 Again, from a prejudicial standpoint, I'm not sure
5 how Mr. Mitchell is prejudiced by these two charges being
6 lumped together when I think the evidence is admissible for all
7 purposes.

8 There was one issue related to timing, Your Honor.
9 The theft charges, with the exception of I think four months,
10 completely overlap with the bribery conspiracy, so I think
11 there is a significant overlap in time as well alleged in the
12 indictment.

13 THE COURT: Thank you. Mr. Pericak, did you wish to
14 weigh in?

15 MR. PERCICAK: Yes, briefly because most of it has
16 already been said. Mr. Phelps mentioned it's going to be
17 admissible as 404(b), but in our papers we point out we have a
18 nice Ninth Circuit case that says, surprisingly to me, that the
19 Ninth Circuit is on the side of the Government, that if it's
20 admissible under 404(b), that might make it admissible under
21 8(a) but not sufficient for joinder under Rule 8(b). That's
22 the *Satterfield* case.

23 The point is as to Mr. Kacher, this evidence is not
24 admissible. 8(b) is a stricter statute or rule than 8(a), and
25 I just don't think that they meet the requirements. First of

1 all, I agree with Ms. Abelson, it's not pled in the indictment.
2 I heard what Mr. Phelps read. That still doesn't sound like
3 it's pleading common scheme or plan in the indictment. But
4 even all the justification for it doesn't seem to me to show a
5 common scheme or plan sufficient to make it to be joined.

6 I just think that the evidence in the two trials is
7 just going to be different. 404(b) aside, which that's one of
8 my complaints about severance is if you're going to admit
9 404(b) evidence against Mr. Mitchell, it's 600 embezzlements.
10 How's is that going to make Mr. Kacher look? I just think the
11 prejudice from that is very strong.

12 In any event, the bottom line is I don't think it's
13 alleged in the indictment as it's required to be, although the
14 Fourth Circuit hasn't said that. Five circuits have said it
15 has to be, two have said it doesn't have to be. But even if
16 you take the extra factors that Mr. Phelps has pointed out, I
17 just don't think it shows a common scheme or plan sufficient to
18 comply with Rule 8(b).

19 MR. PHELPS: Your Honor --

20 THE COURT: Let's let Ms. Abelson go one more time
21 and then I'll hear from you.

22 MS. ABELSON: Your Honor, may I respond to
23 Mr. Phelps?

24 THE COURT: Sure.

25 MS. ABELSON: Your Honor, Mr. Phelps has said

1 repeatedly in a conclusory manner, both in his briefing and
2 here today, that this would be admissible 404(b). We have laid
3 out reasons why we do not believe the evidence as to the two
4 sets of counts would be admissible 404(b), and we can't even
5 respond to the Government's arguments because they haven't
6 articulated a theory under that rule.

7 In addition, a number of the Government's arguments
8 about judicial economy, the Fourth Circuit and various courts
9 around the country have articulated that the questions of
10 judicial economy are not relevant in terms of determining
11 whether or not counts are related as being part of a common
12 scheme or plan. Those are other issues that the Government has
13 not raised in terms of explaining why they believe this was
14 joined properly. Those are issues that are relevant to the
15 Court's discretion under Rule 14 which is our secondary
16 argument here, although we do not believe that the counts are
17 properly joined and severance is mandatory if they are
18 misjoined.

19 But I do want to respond to this idea of common
20 witnesses here. Two of the witnesses that the Government have
21 listed today are law enforcement witnesses who investigated
22 this case. The fact that they might have to testify in two
23 separate trials is not an issue of judicial economy. The
24 Fourth Circuit has made very clear that just because facts may
25 have been developed during the same investigation by the same

1 law enforcement officers does not mean that they are properly
2 joined. So the fact that two law enforcement officers would
3 have to come and testify twice is just part of the job. It's
4 not something that would require -- would defeat our relief
5 from misjoinder.

6 I do want to discuss briefly *United States vs.*
7 *Hawkins* which is one of the key issues in the Fourth Circuit --
8 key cases in the Fourth Circuit on Rule 8(a). The facts in
9 *Hawkins* were that there was an investigation into an armed
10 carjacking and two weeks later, the defendant was arrested and
11 found to be in possession of a firearm that was different than
12 the one that was alleged to have been used in the armed
13 carjacking. It's hard to think about that type of violent
14 crime in the same context as the allegations here. But
15 basically the argument that Mr. Phelps has made, that by just
16 alleging that Mr. Mitchell used his position at MDBC to enrich
17 himself and that that is the link that makes this a common
18 scheme or plan is essentially the same as saying that
19 Mr. Hawkins had access to firearms.

20 The Court in the Fourth Circuit said that was not a
21 part of a common scheme or plan; that the fact that Mr. Hopkins
22 possessed a firearm or was alleged to have possessed a firearm
23 two weeks later, that that felon-in-possession count should be
24 severed from the earlier carjacking counts and that joinder was
25 impermissible. So for the same reasons, joinder is

1 impermissible here.

2 THE COURT: Thank you. Mr. Phelps.

3 MR. PHELPS: Yes, Your Honor. Three points. First
4 of all, it is our position that this evidence could be
5 admissible under Rule 404(b), but I don't want to concede that
6 this evidence isn't intrinsic evidence of Mr. Mitchell's
7 conduct. Again, when you overlay everything on top of each
8 other, I don't see he's committing bribery one day and theft
9 another and bribery one day and theft another. This is all
10 part of kind of who he was and what he did as CEO of Maryland
11 Broadband.

12 I want to talk about, one thing I didn't address was
13 the prejudice to Mr. Kacher by the joinder of the bribery and
14 theft trials. This is both a prejudice argument and a judicial
15 economy argument, Your Honor. Once we're all here for one
16 trial, the added evidence associated with the theft counts is
17 minimal because the witness is already here, they're already
18 going to be testifying, and we just need to ask a few more
19 questions of that witness about the defendant's conduct. We're
20 not going to be putting on evidence of 600 isolated
21 transactions of theft. That's not what we would do.

22 So, again, from a prejudice standpoint and from a
23 judicial economy standpoint, I don't think Mr. Kacher is going
24 to be prejudiced if once a Maryland Broadband representative is
25 already on the stand or once the former CEO is on the stand,

1 having 15 or 20 more minutes of questions particularly related
2 to the theft, I think the jury is going to be able to hear that
3 additional evidence and not hold it against Mr. Kacher.

4 Then whether it's both -- first of all, if you look
5 at the case law related to 8(a), it's very -- courts don't
6 apply either 8(a) or 8(b) rigidly. There's a lot of
7 flexibility given to courts to weigh the competing interests,
8 including judicial economy. I'll read from a Fourth Circuit --
9 excuse me, a District of Maryland case interpreting 8(b) and
10 quoting -- which is the more stringent case: 8(b) is still
11 quite broad. Rule 8(b)'s use of the word transaction is,
12 quote, "not a technical term nor is it a word of art." Quote,
13 "transaction frequently involves the balancing of conflicting
14 interests, speed, efficiency and convenience in the functioning
15 of the federal judicial machinery against the right of the
16 accused to a fair trial without any substantial prejudice to
17 that right occasioned by the joinder of the offenses and/or
18 defendants."

19 So 8(a) says what it says, 8(b) says what it says,
20 but I think at the end of the day, it still comes down to these
21 hallmarks of prejudice and judicial efficiency, and I think
22 both of those factors weigh in favor of a single trial.

23 THE COURT: All right. There's obviously a lot of
24 different factors to consider here. I will say at the outset,
25 I do think that it is appropriate to sever the theft and

1 embezzlement from the conspiracy offenses. I reached that
2 conclusion not so much on an 8(a) theory, although I'm not
3 necessarily persuaded that a common scheme is present here. I
4 readily concede that personal gain appears to be the motive in
5 both circumstances, but I don't think in the context of sort of
6 theft and fraud expenses that just having personal gain for the
7 motive is enough to transform it into a common scheme. There's
8 also some temporal overlap. But, again, it seems to me sort of
9 to be two things that are going on at the same time.

10 I am more persuaded by Mr. Kacher's 8(b) argument
11 which I do think that, again, it doesn't seem to be part of the
12 same act or transaction. It is clearly distinct conduct. The
13 evidence is largely going to be different, although I take the
14 Government's point that it may not be extensive evidence as to
15 the fraud and embezzlement scheme which, frankly, means
16 hopefully that would be a shorter sort of a trial on its own.
17 But I do think that there is reason to believe that it would be
18 prejudicial to Mr. Kacher to try them together and that I don't
19 think this is part of the same act or transaction, even looking
20 broadly at the same act or transaction.

21 I also do think with respect to Mr. Mitchell that he
22 has a propensity argument and prejudice argument to be made
23 under Rule 14 which outweighs the judicial efficiency concerns
24 of having a joint trial. I think that this is a circumstance
25 in which the evidence could be much stronger as to one set of

1 offenses than the other and that the potential message to the
2 jury that this was a defendant who was generally abusing his
3 role is one that could create prejudice to Mr. Mitchell if
4 these offenses were tried together.

5 I am not at this point ruling on the 404(b)
6 argument, although obviously I would still have probably
7 similar prejudice concerns, but I'm not making a ruling until
8 that issue is briefed. And now that I've said it will be
9 separate trials, I will be happy to entertain a 404(b) motion
10 when we can flesh those issues out more specifically.

11 Obviously, it wasn't raised yet because we didn't know that it
12 was going to be separate trials at this point. But my intent
13 at this point, subject to the *Bruton* argument that may yet be
14 raised, is that we would have two trials in this matter; one,
15 the fraud and embezzlement trial as to Mr. Mitchell and, two,
16 the conspiracy trial jointly against both defendants.

17 Have I missed anything with respect to the severance
18 arguments?

19 MR. PHELPS: Nothing, Your Honor.

20 MS. ABELSON: No, Your Honor.

21 MR. PERCICAK: No, Your Honor.

22 THE COURT: Let me ask you this and, again, I know
23 things could change based on the *Bruton* argument. Do the
24 parties have a sense of the length of those respective trials
25 assuming that they go forward the way I just laid it out?

1 MR. PHELPS: Your Honor, I think -- does Your Honor
2 sit on Fridays?

3 THE COURT: Typically I do sit on Fridays but it kind
4 of depends on the week we find. So the easiest thing for me is
5 if you give me an estimate of trial days, and I would look for
6 an appropriate window.

7 MR. PHELPS: Considering jury selection, openings and
8 closings, I would ask for eight days, eight trial days.

9 THE COURT: For which trial?

10 MR. PHELPS: For the bribery trial.

11 THE COURT: The conspiracy.

12 MR. PHELPS: Conspiracy, yes.

13 THE COURT: And what about the embezzlement, theft
14 trial?

15 MR. PHELPS: Probably five days. Still have got to
16 pick a jury.

17 THE COURT: Does that sound -- I don't know if that
18 took into account any defense case or that was just the
19 Government's proof --

20 MR. PHELPS: I would say that's largely just the
21 Government's case, Your Honor, yes.

22 MR. PERCICAK: Your Honor, I have a fairly developed
23 witness list. I think I have six witnesses, two days at the
24 most. I'm assuming -- making some assumptions about who
25 Mr. Phelps is going to call.

1 THE COURT: Sure. I'm not going to hold anyone to
2 the specific timing. I'm trying to get a sense of rough
3 estimates.

4 MS. ABELSON: We would also estimate putting on a
5 case, although it's not entirely clear, one to two days.

6 THE COURT: For both trials or just for the
7 conspiracy?

8 MS. ABELSON: For both trials.

9 THE COURT: Obviously we cannot schedule the bribery
10 trial at this point because we still need to get to the bottom
11 of this *Bruton* issue, and I don't want to go setting a trial
12 date and then deciding that we have to sever into more trials
13 and doing something that's --

14 MR. PHELPS: Your Honor, would it make sense to
15 schedule a bribery trial with the expectation that it's either
16 going to be a one-defendant or two-defendant trial, but at
17 least we get one on the calendar?

18 THE COURT: We can do that, although the length of it
19 may change, so we would have -- looks like we would be needing
20 to find a three-week window if it is all together and
21 potentially would be two-week windows if they were separate.

22 MS. ABELSON: Your Honor, I think it would be best
23 for the Office of the Federal Public Defender, for some
24 administrative reasons, to set a conference call to determine
25 this sometime in the next several days if we can.

1 THE COURT: That's fine. I will tell you that right
2 now, my fall is booked. So I don't have dates until after the
3 first of the year, so we're looking at dates in early 2024, so
4 I'll let you know that at the front end. I do have some other
5 criminal trials that are already in that window. Again, you
6 guys are looking for, at this point, a three-week window which
7 can be tricky to find with intermittent trials dispersed
8 around.

9 Why don't we do this. We can ask the parties to
10 jointly confer to look for three-week windows that work for all
11 of you, and then we can have a conference call and you can run
12 the few three-week windows that you find by me, and we can
13 compare calendars. Does that make sense?

14 MR. PHELPS: Yes, Your Honor.

15 MS. ABELSON: Yes, Your Honor.

16 THE COURT: Then I guess we would need a slightly
17 more than one-week window for the embezzlement theft trial too,
18 and perhaps the Government and public defender can confer on
19 some of those which will probably be easier to find.

20 MR. PHELPS: Yes, Your Honor.

21 MR. PERCICAK: I don't want to be a fly in the
22 ointment on scheduling, but I'm leaving for Europe on Monday
23 for two weeks.

24 MR. PHELPS: I start a trial on Monday as well.

25 MR. PERCICAK: I'm just talking about our getting

1 together. If we could do it this afternoon, that would be
2 great. Otherwise, it's going to be two weeks before I can even
3 talk to you.

4 MR. PHELPS: I think it's more for them than it is
5 for me.

6 MS. ABELSON: It is for us. It's not entirely clear
7 what our trial team will be.

8 THE COURT: Okay. Let me say this. I am not in a
9 particular hurry to get an answer on this, although I know some
10 other people have an interest in getting this done quickly.
11 Why don't I ask you to confer this afternoon. If the answer is
12 we need to defer this until after Mr. Pericak gets back from
13 vacation and Mr. Phelps gets out of trial before we can get
14 these windows, just let my chambers know, and we'll wait to
15 hear from you when you say we can hear from you, knowing that
16 we're not foregoing any fall dates because I don't have any so
17 we're looking for after the first of the year anyway.

18 I'll just ask you to confer at the conclusion of this
19 proceeding, figure out a timetable for at least getting me some
20 windows, and then we'll go from there. Does that make sense to
21 everybody?

22 MR. PHELPS: Yes, Your Honor.

23 MS. ABELSON: Yes, Your Honor.

24 MR. PERCICAK: Yes.

25 THE COURT: Have I missed anything with respect to

1 the motions? I guess to formalize the rulings I have made, I
2 have granted ECF 57 which is Mr. Mitchell's motion to sever the
3 theft counts. I have granted Mr. Kacher's motion seeking the
4 return of his seized items. Then with respect to Mr. Kacher's
5 motion ECF 59 which requested several different forms of
6 relief, I think at this point I've granted in part and denied
7 in part and deferred in part on that motion and it's sort of
8 awaiting final disposition.

9 Does that comport with everybody's understanding?

10 MR. PHELPS: Yes, Your Honor.

11 MR. PERCICAK: Yes, Your Honor.

12 THE COURT: All right. Is there anything else that
13 we need to address this afternoon?

14 MR. PHELPS: Nothing from the Government. Thank you,
15 Your Honor.

16 MS. ABELSON: Nothing from Mr. Mitchell.

17 MR. PERCICAK: Nothing from Mr. Kacher.

18 THE COURT: Thank you. I'll look forward to hearing
19 from you at least as to the timing by which I might get some
20 dates from you.

21 THE CLERK: All rise. This Court stands in recess.

22 (Proceedings concluded at 12:24 p.m.)
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1 CERTIFICATE OF OFFICIAL REPORTER

2 I, Patricia G. Mitchell, Registered Merit Reporter,
3 Certified Realtime Reporter, in and for the United States
4 District Court for the District of Maryland, do hereby certify,
5 pursuant to 28 U.S.C. § 753, that the foregoing is a true and
6 correct transcript of the stenographically-reported proceedings
7 held in the above-entitled matter and the transcript page
8 format is in conformance with the regulations of the Judicial
9 Conference of the United States.

10 Dated this 10th day of October 2023.

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12 

13 _____
14 Patricia G. Mitchell, RMR, CRR
15 Federal Official Reporter
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